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November 17, 2008

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: June 13, 2008

Case Number: TSO-0643

This Decision considers the eligibility of XXXXXXXX XXXXXXXX (hereinafter referred to as "the individual") to hold an access authorization under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As explained below, it is my decision that the individual should not be granted an access authorization.

I. BACKGROUND

The individual held a DOE access authorization from 1981 until November 1998, from June 1999 until September 1999, and from April 2000 until March 2001. "Case Evaluation Sheet", DOE Exhibit 3. A request for reinstatement was received from the individual's employer in July 2007, and in December 2007, the DOE conducted a Personnel Security Interview with the individual (the 2007 PSI) regarding his past legal problems, his employment history, and his financial situation. In addition, the individual was evaluated in February 2008 by a DOE-consultant psychologist (the DOE-consultant Psychologist), who issued a report setting forth her conclusions and observations. DOE Exhibit 17.

In May 2008, the Manager for Personnel Security of the DOE area office where the individual is employed (the Manager) issued a Notification Letter to the individual. Enclosure 2 to this letter, which is entitled "Information Creating a Substantial Doubt Regarding Eligibility for Access Authorization," states that the individual's behavior has raised security concerns under Sections 710.8(f), and (l) of the regulations governing eligibility for access to classified material (Criteria F and L).

With respect to Criterion F, the Notification Letter finds that the individual deliberately misrepresented, falsified, or omitted

significant information to the DOE. Specifically, it finds that at his 2008 DOE psychological evaluation, he only admitted to one arrest in November 2003, when he also had been arrested in 1974, 1984 and 1989. It also finds that at the 2007 PSI, he initially denied any arrests involving sexual activities, and then admitted to an incident and related arrest in the 1970's. However, he failed to mention a 1984 arrest for touching young women. It also finds that on a 1992 Questionnaire for Sensitive Positions (QSP), the individual indicated that he had not been arrested in the last five years while, at a 1993 PSI, he admitted that he was arrested and charged with shoplifting in May 1989. See Enclosure 2 to Notification Letter, DOE Exhibit 1.

The Notification Letter finds with respect to Criterion L that the individual has engaged in unusual conduct or is subject to circumstances which tend to show that he is not honest, reliable, or trustworthy. Specifically, it finds that after evaluating the individual in February 2008, the DOE-consultant Psychologist concluded that in light of his history of poor judgment, impulsive behavior, and disregard for social expectations, he is likely to continue his pattern of sporadic indiscretions. 1/

The Notification Letter also refers to numerous instances of questionable or criminal conduct by the individual. It finds that despite coming out of Chapter 7 Bankruptcy in 2002, the individual has been gambling about three times a week, \$200 to \$300 a week, since 2002. It finds that in November 2002, a former employer warned the individual that if he continued accessing images of scantily clad women on the internet at work, he would be terminated. Despite this warning, he continued accessing these websites, and was terminated in August 2003. Id.

The Notification Letter finds that because of his efforts to contact an ex-girlfriend, the individual was issued restraining orders in 2001, 2003 and 2004, that in April 2003 he was charged with violation of a restraining order, and that in January 2004 a warrant was issued for his arrest concerning another violation of a restraining order. It also finds that in 1997, a restraining order was issued to him in the context of his divorce.

1/ The Operations Office also finds that in March 1985, a DOE-consultant psychiatrist evaluated the individual and concluded that he suffered from "Adjustment Disorder with Disturbance of Conduct, Mild and Episodic." In 1974, another psychiatrist diagnosed the individual as suffering from Passive-Dependent Personality Disorder.

The Notification Letter finds that the individual was arrested for shoplifting in 1989, and that he was terminated from a utility company for falsifying his application in 1979. ^{2/} Finally, it refers to the individual's arrests in 1984 and 1974 for touching women, finds that he also was terminated from employment in the early 1970's for touching women, and finds that in 1973, state college police turned him over to municipal police for touching a woman. *Id.*

II. THE SEPTEMBER 2008 HEARING

At the individual's request, a hearing was convened in September 2008 to afford him an opportunity to submit information to resolve these concerns. At the hearing, testimony was received from seven persons. The DOE presented the testimony of the DOE-consultant Psychologist. The individual testified and presented the testimony of a psychiatrist who he engaged for evaluative purposes (the individual's psychiatrist), his current supervisor, his girlfriend, a longtime friend, and a longtime friend and former co-worker (the friend/co-worker).

The hearing testimony focused on the opinions of the medical professionals concerning the individual's behavioral history, and the individual's efforts to explain that he has not deliberately omitted information when responding to DOE inquiries, and to present evidence to mitigate the concerns raised by his past statements, behavior and legal problems.

III. APPLICABLE STANDARDS

A DOE administrative review proceeding under this Part is not a criminal case, in which the burden is on the government to prove the defendant guilty beyond a reasonable doubt. In this type of case, we apply a different standard, which is designed to protect national security interests. A hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). The burden is on the individual to come forward at the hearing with evidence to convince the DOE that granting or restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(d).

^{2/} The Notification Letter erroneously states that this occurred in "approximately 1968."

This standard implies that there is a presumption against granting or restoring of a security clearance. See *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) (the "clearly consistent with the interests of national security test" for the granting of security clearances indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues. *Personnel Security Hearing (Case No. VSO-0002)*, 24 DOE ¶ 82,752 at 85,511 (1995).

Once a security concern has been found to exist, the individual has the burden of going forward with evidence to rebut, refute, explain, extenuate or mitigate the allegations. *Personnel Security Hearing (Case No. VSO-0005)*, 24 DOE ¶ 82,753 (1995), *aff'd*, 25 DOE ¶ 83,013 (1995). See also 10 C.F.R. § 710.7(c).

IV. FINDINGS AND ANALYSIS

A. Criterion F Concerns

False statements by an individual in the course of an official inquiry regarding a determination of eligibility for DOE access authorization raise serious issues of honesty, reliability, and trustworthiness. The DOE security program is based on trust, and when a security clearance holder breaches that trust, it is difficult to determine to what extent the individual can be trusted again in the future. See, e.g., *Personnel Security Hearing (Case No. VSO-0281)*, 27 DOE ¶ 82,821 at 85,915 (1999), *aff'd*, 27 DOE ¶ 83,030 (2000) (terminated by Office of Security Affairs, 2000).

With respect to Criterion F, the Operations Office finds that the individual omitted significant information in responding to questions at his February 2008 DOE psychological evaluation, his December 2007 PSI, and his 1992 QSP. At the hearing, the individual testified that when he answered the written questions at his 2008 psychiatric evaluation, he did not feel that he needed to go back to the early 1970's to list all of his arrests. He stated that he thought that he only had to go back seven years, because the issue before the DOE was the reinstatement of his clearance. He stated that he could not have been trying to deceive the DOE-consultant Psychologist, because he knew that all of his arrests already were reported to the DOE. TR at 277.

The individual stated that at the 2007 PSI, he initially answered "no" to a question about having committed any sexual assaults because he believed that the security specialist was asking about the last seven years. He stated that he then recounted to the security specialist an incident in 1971 where he was fired for an act of sexual touching. He asserted that the DOE was not previously informed of this incident, because there was no arrest concerning that incident, and argued that clearly he was not trying to withhold information. TR at 278-279. He testified that he also identified to the security specialist a 1972 arrest for sexual assault, 3/ but admits that he failed to identify his 1984 arrest for sexual assault. TR at 280-281.

The individual testified that he omitted his 1989 arrest for shoplifting from a 1992 QSP because he did not consider it a "full-blown arrest." He stated that the police officer showed up at the store where the incident occurred and gave him a citation, which he took to court and paid a \$50 fine. TR at 259-260.

I am not convinced by the individual's assertions that his omissions of derogatory information were based on a reasonable interpretation of the DOE's questions. With regard to the 2008 psychiatric evaluation, the DOE-consultant Psychologist testified that when she evaluates individuals for the DOE, she requests extensive background information from them. She stated that she does not recall the specifics of her interview with the individual, but that she usually asks people if they ever have been arrested, and that she never asks them to limit their response to the last seven years. She testified that no one else who she has examined has limited their response to the last seven years. Tr at 21-22, 38.

At the hearing, the DOE counsel questioned the individual concerning other instances where the individual appeared to avoid revealing derogatory information in the context of employment applications or security clearances. The individual admitted that he was fired from a job in 1979 in part because he failed to report his 1974 arrest for sexual assault. He stated that he did not report the arrest because he had forgotten about it. TR at 201. He further stated that he did not report the 1974 arrest on his 1985 Personnel Security Questionnaire (PSQ) where it asked "have you ever been arrested" because the PSQ was a five year update. TR at 248.

3/ The record indicates that this arrest took place in 1974, not 1972.

In addition, the individual acknowledged that in a 1980 application for employment with a DOE contractor and in a related DOE Questionnaire for Sensitive Position, he falsely stated that he had completed a Masters Degree. He testified that he provided those answers because he expected to receive the degree in the near future, although he actually did not receive it until 1982. TR at 241-245.

At the hearing, the individual also confirmed that he was arrested for sexual assault in 1984 after he improperly touched a woman, and later pled guilty to harassment. He admitted that he falsified his account of the arrest at his 1985 PSI to omit the touching, and that he falsified his 1985 PSQ by stating that he was arrested for harassment rather than for sexual assault. He testified that he falsified these accounts because he feared that telling the truth would end his marriage. TR at 245-247.

Although the individual's psychiatrist, his supervisor, and his longtime friend described the individual as a moral and honest person, their opinion does not outweigh the individual's extensive history of minimizing or omitting derogatory information to the DOE. The individual's psychiatrist expressed his belief that the individual failed to report his full history of arrests to the DOE-consultant Psychologist in 2008 because the individual came to that interview with a preformed notion that he was being judged for the last seven years, and regardless of what was asked of him at the interview, he answered along those lines. TR at 53. Even if I accepted this explanation, it would not resolve the DOE's concern. If the individual places time frames on DOE questions that were not in those questions, the DOE cannot be assured that the individual will properly report necessary information in the future.

In light of his extensive history of failing to present derogatory information to the DOE in an accurate and straightforward manner, I am not convinced that the individual did not act deliberately when he failed to report his full arrest record to the DOE-consultant Psychologist, his 1984 sexual assault arrest at his 2007 PSI, and his 1989 shoplifting arrest on his 1992 QSP. As I stated to the individual at the outset of the hearing, an affirmative finding regarding eligibility for access authorization is possible only for individuals who cooperate by providing full, frank and truthful answers to the DOE's relevant questions. TR at 9. Based on the evidence discussed above, I find that the individual has not mitigated the Criterion F security concerns.

B. *Criterion L Concerns*

The Notification Letter correctly identifies the individual's history of arrests, his receipt of restraining orders, his terminations for cause, his computer misuse, and indications of his financial irresponsibility as derogatory information under Criterion L. Criterion L applies broadly to "circumstances" indicating that the individual is "not honest, reliable, or trustworthy" or that "furnishes reason to believe" that the individual may be subject to pressure to act contrary to the interests of national security. 10 C.F.R. § 710.8(l). Thus, the individual's behavior raises Criterion L concerns about his willingness to comply with applicable laws and workplace rules, and, more generally, his judgment and reliability. Accordingly, I now turn to whether the individual has resolved those concerns.

(1) *The Individual Has Mitigated the Security Concern Relating to His Gambling Activity*

At his 2007 PSI, the individual reported that he has been gambling about three times a week, \$200 to \$300 a week, since 2002. The Notification Letter found that this level of gambling raised a concern in light of the individual's recent Chapter 7 Bankruptcy. At the hearing, the individual explained that his bankruptcy occurred in November 2001 while he was unemployed. He stated that he had co-signed his ex-girlfriend's \$17,000 car loan, and that he filed for bankruptcy protection when he became concerned that the bank holding that car loan would garnish his unemployment insurance, and that he would be unable to make support payments to his children. TR at 233. The individual indicated that he did not begin to gamble until he became employed in a different state in June 2002. TR at 236. His girlfriend, who has known the individual since December 2001, confirmed his account. TR at 145-165.

With regard to his current gambling activity, the individual stated that at the time of the 2007 PSI, he was gambling \$200 to \$300 a week because his rent was low, and he had adequate discretionary income to support that level of activity. He testified that he now limits his gambling losses to no more than \$100 a week, because he and his girlfriend have purchased a home together and their mortgage is triple their former rent. His girlfriend confirmed that since they purchased a home in early 2008, they visit a casino once or twice a week, and that they gamble \$100 to \$200 per month. TR at 145-165. The individual also referred to his financial disclosure form, which indicates that he has about \$988 a month of discretionary income to save or to use for recreational

activities such as gambling. TR at 228-233, Individual's Exhibit E. Finally, the individual's friend/co-worker stated that the individual is meticulous about his finances, and he believes that the individual's gambling is just a recreational activity. TR at 145-165.

In light of the evidence discussed above, I conclude that the individual has shown that his gambling in recent years has not been evidence of financial irresponsibility. He has shown that his gambling practices were unrelated to his 2001 bankruptcy filing, and that he has consistently exercised due care not to accrue gambling losses that he cannot afford. Accordingly, I find that the individual has mitigated this concern.

(2) The Individual Has Not Resolved the Remaining Security Concerns

(i) The Individual Has Demonstrated a Lengthy Pattern of Irresponsible Behavior

At the hearing, the DOE-consultant Psychologist testified that she is concerned that the individual has a history of poor judgment, impulsive behavior and a disregard for following rules that dates back to the early 1970's. She testified that she is most concerned by the behavior that resulted in his being fired in 2003 after ignoring warnings not to use his personal computer to access the internet for personal reasons. TR at 25. She stated that the individual's past actions demonstrate poor judgment that could affect his ability to perform or make decisions in a reliable manner. TR at 26. Based on his history, she opined that his unreliable behaviors keep repeating in various ways, such as an instance of shoplifting, not disclosing information requested by the DOE, and failing to heed a warning about inappropriate computer use. TR at 26.

In his testimony, the individual's psychiatrist viewed the individual's history as indicating increasing maturity. He stated that he believes that the individual had an arrested development that lasted through the 1970's and 1980's, when the individual exhibited a lack of maturity and an inability to learn from his experiences. TR at 46. He stated that the individual now is ashamed of his behavior during this period, and does not know why he did it. TR at 47. The individual's psychiatrist testified that he does not share the DOE-consultant Psychologist's view that the individual's computer misuse in 2002-2003 indicates a significant personality defect. He stated that the individual's termination for computer misuse occurred because the individual has a rebellious streak and, even though he was given limits by his

employer, the individual did not use his adult mind-set to recognize that this misuse was developing into a problem that could get him dismissed. TR at 58. The individual's psychiatrist believes that the individual continues to possess a rebellious streak as a part of his nature, but that this does not mean that he cannot control his future actions. TR at 65.

I find the analysis of the DOE-consultant Psychologist to be persuasive in identifying an ongoing pattern of irresponsibility in the individual's behavior. In his testimony, the individual's psychiatrist appeared to be focused on whether the individual exhibited pathological behavior that supported a diagnosable mental illness, and dismissed behavior that did not rise to this level as merely exhibiting a "rebellious streak." However, a failure to use an "adult mind-set" and to ignore the rules of his employer are unacceptable behavior for someone possessing an access authorization.

(ii) The Individual Has Failed to Show that His Pattern of Irresponsible Behavior Has Ended

At the hearing, the individual and his witnesses testified in detail about the incidents described in the Notification Letter, and offered explanations aimed at mitigating the DOE's concerns. The individual testified that his sexual assaults in the 1970's and early 1980's involved inappropriate pats, pinches and touching. He stated that it was impulsive behavior that did not follow societal norms in respecting other people's rights. He testified that the 1984 incident was the last time he committed such an act. TR at 199-203. The individual testified that his 1989 arrest for shoplifting involved the theft of a 79 cent wallet insert, which he took because he could not buy the insert without purchasing the wallet. He expressed regret for the theft. TR at 203-2004.

The individual stated that his ex-girlfriend was granted a restraining order against him in 2001 in order to prevent him from contacting her about paying back money that she owed to him. He stated that he was convicted of violating it after he attempted to have a friend serve her with court papers. He testified that his conviction for violating the order was overturned on appeal. TR at 219-220, 269-271. He stated that he subsequently was convicted of violating a permanent restraining order in 2003. He stated that this occurred because he forgot about the restraining order and sent his ex-girlfriend a signed note asking for money he believed that she owed to him. TR at 274-275. The testimony of the individual's longtime friend basically confirmed his account. TR at 91-98,

The individual admitted that he was fired in 2003 for blatant disregard of the rules governing workplace computer use. 4/ He acknowledged that he was warned about the inappropriate use, and continued it. He stated that he does not know why he did this, and wishes he had had a different frame of mind and heeded the rules. He stated that he has learned "a big lesson from that." TR at 225.

The Individual's supervisor testified that the individual has worked for him for about twenty months, and that the individual has demonstrated diligence and concern for doing his job correctly. He testified that the individual routinely works with sensitive information and that he is not aware of any mishandling of this information by the individual. He stated that the individual always responds honestly in workplace dialogues. TR at 125-139.

The individual's friend/former co-worker testified that he worked with the individual at a DOE facility from about 1981 through 1998, and that the individual was very detail oriented and always followed the rules when handling classified materials. TR at 140-145. He stated that following the individual's divorce in the late 1990's, the individual made a real shift in personality and became more respectful in his treatment of others. He stated that in the last five years, the individual has entered into a stable period in his life, and is demonstrating greater maturity. TR at 145-165. The individual's longtime friend testified that from about 1980 until the late 1990's, they worked in different areas of the same DOE facility. He stated that the individual is honest, loyal and trustworthy, is dedicated to his work, and that he knows of no security breaches involving the individual. TR at 99-104.

The individual's psychiatrist testified that it took the individual an extra 15 years, but that he is now an adult. He stated that the individual has a strong sense of moral values, and that now he better understands the context in which he is operating. He stated that he would hire and trust the individual. TR at 56-57. He stated that the individual's current relationship with his girlfriend is stable and reflects his maturity. TR at 51. The individual's psychiatrist testified that he is clinically confident

4/ The Notification Letter states that the computer misuse began in 1999, while the individual contends that this activity began in October 2001, when he was permitted to use his former employer's computer during a period of unemployment, and that he continued the activity when he again became employed in June 2002. Id. at 4. I accept the individual's clarification of this date.

that the individual will not repeat his irresponsible behavior because his most egregious behavior involving improper touching occurred many years ago. He rejected the notion that the individual's more recent problem concerning his looking at sexually related internet sites in the workplace was connected to this past behavior, opining that the individual's workplace behavior involving his computer was not unusual and did not indicate a "moral failing." TR at 78-79.

While this testimony indicates that the individual has gained some measure of insight into his past actions, and now is enjoying a stable relationship with his girlfriend, he has not demonstrated that he has overcome his past pattern of irresponsible conduct. In this regard, I share the concerns raised by the DOE-consultant Psychologist, who testified that her experience with people with maladaptive behaviors that span many years indicates that the individual's problem is entrenched to a certain degree, and is likely to continue. TR at 27-28.

Evidence received at the hearing supports this view. In his testimony, the individual acknowledged that at his 2007 PSI, he admitted to the DOE security specialist that he was violating his current employer's policy concerning computer use when he accessed his credit card sites to check on his credit charges. He further testified that because the DOE security specialist questioned this practice at the 2007 PSI, he reduced the frequency with which he accesses his credit card sites and news sites such as MSN from his work computer, and now accesses them "very rarely." TR at 262-263.

5/

Based on this testimony, I find that the individual has chosen to deliberately violate his current employer's stated policy concerning computer use. Moreover, when he was warned about that misuse by a DOE security specialist, he chose to continue the improper conduct with reduced frequency. I find that this is strong evidence that the individual continues to demonstrate a persistent and unacceptable level of disregard for rules of workplace conduct. With respect to the misuse of his workplace computer, the individual must end his misconduct for a period of time before the DOE's concerns can be mitigated. In light of the individual's ongoing conduct, applicable adjudicative standards as well as DOE precedent support the conclusion that the individual

5/ The record indicates that the individual's current employer has not warned or disciplined the individual for these activities. See Testimony of the individual's supervisor, TR at 137-139.

has not resolved the security concerns relating to his ongoing pattern of irresponsible behavior evidenced by his misuse of his work computer. See *Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (issued on December 29, 2005 by the Assistant to the President for National Security Affairs, The White House) (the *Adjudicative Guidelines*), Guidelines ¶ 17(c) and (d), ¶ 41(a). See also, *Personnel Security Hearing, Case No. TSO-0541*, 30 DOE ¶ 82,754 (2008) (less than one year's misuse, ending three years before hearing); *Personnel Security Hearing, Case No. TSO-0510*, 30 DOE ¶ 82,783 (2008) (two months' misuse, ending two years before the hearing). In light of the individual's ongoing inappropriate conduct, I find that he has not mitigated the DOE Criterion L concerns.

V. CONCLUSION

For the reasons set forth above, I find that the individual has not mitigated the Criterion F concerns set forth in the Notification Letter, and has not fully mitigated the Criterion L concerns set forth in that letter. Accordingly, after considering all of the relevant information, favorable or unfavorable, in a comprehensive and common-sense manner, I conclude that the individual has not demonstrated that granting the individual an access authorization would not endanger the common defense and would be clearly consistent with the national interest. It is therefore my conclusion that the individual should not be granted an access authorization. The individual or the DOE may seek review of this Decision by an Appeal Panel under the regulation set forth at 10 C.F.R. § 710.28.

Kent S. Woods
Hearing Officer
Office of Hearings and Appeals

Date: November 17, 2008